STATE OF MICHIGAN

COURT OF APPEALS

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4100, AMERITECH AFRICAN AMERICAN EMPLOYEES FOR EQUALITY, DANIEL DAVIS, MICHAEL RODGERS, and JAMES EDWARD HARRISON, III,

Plaintiffs-Appellees,

V

AMERITECH SERVICES, INC., AMERITECH MICHIGAN, and KIRK BRANNOCK,

Defendants-Appellants.

UNPUBLISHED
June 24, 2003

No. 232886
Wayne Circuit Court
LC No. 98-820922-NZ

Before: Hoekstra, P.J., and Bandstra and Saad, JJ.

PER CURIAM.

Defendants[1] appeal by leave granted from the circuit court's order granting plaintiffs' motion to certify a class in this employment discrimination case. We reverse in part, vacate in part, and remand.

This case arises from Ameritech's reintroduction in 1994 of an employee performance review/management program called Committee on Employee Development and known as "Co-Ed," and a later version of this program, called Performance Management 201 and known as "PM201" (hereinafter referred to collectively as Co-Ed). Co-Ed monitored on a quarterly basis the performance of technicians at Ameritech's Detroit garages and focused on employees whose performance was evaluated to be within the bottom 15% (i.e., the "Co-Ed list") as compared to their fellow employees with respect to quality and productivity. Quality entailed the presence or absence of defects, including the number of customer call-backs after a technician's initial service call; productivity included cycle time, i.e., the average time to complete assigned jobs.

Defendants claim that Co-Ed was designed to improve customer service and the performance of the technicians. According to defendants, employees on the Co-Ed list would

[1] We use the terms "defendants" and "Ameritech" interchangeably throughout this opinion.

receive coaching from managers, thereby improving their own performance and thus improving the performance of the group. Defendants state that employees were disciplined only after the coaching process proved unsuccessful. According to defendants, Co-Ed has improved quality, customer service, and customer satisfaction.

Plaintiffs acknowledge in their complaint that "[i]n theory, [the Co-Ed] list was supposed to be used to identify those persons who were having difficulty and to assist them through coaching and training to improve." However, plaintiffs claim that Co-Ed was punitive and discriminatory, stating that white employees were neither scrutinized nor disciplined to the same degree as were black employees. Further, plaintiffs claim that defendants engaged in systemic retaliation against those members of the purported class, regardless of race, who protested discrimination by verbalizing to management that the Co-Ed program was being implemented in a racially discriminatory manner. Additionally, plaintiffs claim systemic handicap discrimination exists with respect to the Co-Ed list and that "there is a high correlation between those who have been injured on the job, and those who have been placed on the Co-Ed list." Plaintiffs further claim that Ameritech has changed its policies concerning compensation for work-related injuries for the purpose of retaliating against injured workers who seek compensation benefits.

In October 1998, plaintiffs moved to certify the class. Over an almost two-year period, the circuit court held over thirty evidentiary hearings concerning class certification. On February 8, 2001, the circuit court issued a sixteen-page opinion and order granting plaintiffs' motion for class certification. Defendants sought leave to appeal the class certification ruling. Meanwhile, the circuit court approved plaintiffs' class notice,[2] which essentially described a class including three categories of technical employees at three of Ameritech's Detroit garages[3] from 1995 through the first quarter of 1998: (1) African-American potential class members[4]; (2) handicapped potential class members;[5] and (3) protesting potential class members.[6] Shortly

[2] The circuit court's order approving the proposed notice to class members, which includes the definition of the class, was not issued until after defendants filed this interlocutory appeal. To the extent that defendants argue that "the circuit court clearly erred by not identifying the classes or class it certified," we find this argument moot because the circuit court has since confirmed its identification of the class as that provided in plaintiffs' proposed notice for class members. See *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000) ("An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief.")

[3] The three garages include the Linwood, State Fair, and Glendale garages.

[4] This category refers to African-American employees who at any time during the stated period were placed on the Co-Ed list.

[5] This category refers to employees who at any time during the stated period were placed on the Co-Ed list and were injured on the job, causing the employee to be perceived as disabled or having a disability, or requiring the employee to seek workers compensation benefits for an injury sustained before being placed on the Co-Ed list or as the result of being placed on the Co-Ed list.

[6] This category refers to employees who, regardless of whether they were on the Co-Ed list,
(continued…)

thereafter, this Court granted leave to appeal and stayed further proceedings in the circuit court pending resolution of this appeal or further order of this Court.

On appeal, defendants argue that the circuit court erred in granting class certification pursuant to MCR 3.501 for multiple reasons.

We review a trial court's decision on class certification for clear error. *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002). "A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

MCR 3.501(A)(1) governs certification for class actions and provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable [numerosity];
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members [commonality];
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality];
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class [adequate representation]; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice [superiority].

In order to proceed as a class action, the case must meet all the requirements in MCR 3.501(A)(1), *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597; 654 NW2d 572 (2002), and it is plaintiffs' burden to prove all these requirements when plaintiffs are seeking class certification, *id.* at 597-598. "When evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true. The merits of the case are not examined." *Neal, supra* at 15. Further, because Michigan case law on class certification is limited, this Court may refer to federal cases that construe the federal rules concerning class certification. *Neal, supra*.

(…continued)

protested to management about the alleged discriminatory impact of Co-Ed and who suffered an adverse employment action such as: a) a racially hostile working environment; b) discipline, including discharge; or c) the denial of privileges available to persons not on the Co-Ed list such as the ability to transfer or become promoted.

We first address whether the circuit court clearly erred in certifying the class with respect to the African-American potential class members. Defendants challenge each requirement under MCR 3.501(A)(1); however, we need only look to the commonality and typicality requirements, which are similar,[7] *Neal, supra* at 21, to find that the trial court clearly erred in granting class certification.

MCR 3.501(A)(1)(b) requires commonality, which concerns "whether there 'is a common issue the resolution of which will advance the litigation,'" *Zine v Chrysler Corp*, 236 Mich App 261, 289; 600 NW2d 384 (1999), quoting *Sprague v General Motors Corp*, 133 F3d 388, 397 (CA 6, 1998), and "requires that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof,'" *Zine, supra*, quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989). MCR 3.501(A)(1)(c) requires typicality, which means that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." A determination of the nature of the applicable law may be necessary to resolve questions of commonality and of typicality. *General Telephone Co of the Southwest v Falcon*, 457 US 147, 160; 102 S Ct 2364; 72 L Ed 2d 740 (1982); see also *Clayborne v Omaha Public Power Dist*, 211 FRD 573, 580 (D Neb, 2002), citing *Nelson v United States Steel Corp*, 709 F2d 675, 679 (CA 11, 1983) ("Although the court does not at this stage examine and determine the merits of the plaintiffs' case, it may properly consider evidence relating to the discrimination allegedly suffered by the class, as well as the manner in which that evidence fits into the legal framework governing the claims pleaded.").

Here, even accepting plaintiffs' claim that Co-Ed, as administered by defendants, resulted in discriminatory consequences to African-American Employees in the ways alleged, this issue, allegedly common to all African-American claimants, does not predominate over the many individual issues presented, as reflected by an examination of the class representatives. Although each individual plaintiff is African-American, was placed on the Co-Ed list, and was employed in a Detroit garage at issue, these individual plaintiffs all had varying work histories and employment circumstances.

For example, Michael Rodgers claims job stress on the basis of witnessing a murder while on the job, which is not a typical work-related experience. He testified to being on the Co-Ed list after that experience. While on Co-Ed, he received discipline repeatedly for attendance problems, such as not going to work and failing to call in, and he received discipline for the failure to wear a safety belt in a motor vehicle, which he contested, but which he admitted was in no way related to Co-Ed. He also received discipline for failure to use safety equipment, such as a hard hat, safety belt or ladder restraint. Rodgers was fired in 1996, for a safety violation that he apparently disputes, but then was reinstated under a "last chance" agreement. Rodgers then was terminated in 1997 for offering to do a job on the side for a customer, which he disputes.

[7] These two elements, along with adequacy of representation, tend to merge. *General Telephone Co of the Southwest v Falcon*, 457 US 147, 158 n 13; 102 S Ct 2364; 72 L Ed 2d 740 (1982); *Washington v Brown & Williamson Tobacco Corp*, 959 F2d 1566, 1569 n 8 (CA 11, 1992).

Rodgers admitted that his termination in 1997 related to code of conduct violations, not quality or cycle time, although he stated that his termination in 1996 was related to his being on Co-Ed.

Daniel Davis, who remains an employee of Ameritech, experienced a chemical burn while on the job, and about a week after his time off related to the burn, he was placed on Co-Ed. Also, he slipped and fell while carrying a ladder at work and sustained a back injury. He received discipline for unacceptable work, including craftsmanship and access effort. Davis testified that he was off and on Co-Ed. He was fired in August and September 1997, but both were reduced to suspensions. Davis took a three-month leave "[d]ue to stress put on me by the job. Not by the job itself, by supervision." Davis testified that "after I was put back on Co-Ed prematurely, I directly challenged [a supervisor], asked him was this racist."

Finally, James Harrison complained that he was disciplined for taking too long on his repair and/or installation jobs. But in 1990, before the Co-Ed list began, he was terminated for cutting a person with a machete while on break from his job, but he was reinstated under a "last chance" agreement. In 1997, he was fired for misuse of work time, falsification of company records and unauthorized use of company property, which he admitted related to defendants' code of conduct.

Given the distinctly different employment histories of these individual plaintiffs who are the proposed class representatives, and plaintiffs' theories of liability, including both disparate impact and disparate treatment, the latter being subject to different methods of proof,[8] we conclude that the trial court clearly erred in granting class certification. Although plaintiffs argue that Co-Ed is the link that ties this action together, we conclude that this link is insufficient to establish that common issues of law or fact *predominate* under the circumstances here and that the proposed class representatives' employment histories and claims elude typicality. Numerous fact-specific inquiries are required with respect to each proposed class representative and potential class member and the relevant law depends on the theory proffered for each proposed class representative and potential class member. See *Neal, supra* at 17-20.[9] Moreover, two of the individual plaintiffs have aspects of their employment history that are quite unusual, i.e., Rodgers' witnessing a murder while on the job and Harrison's altercation with a woman whom

[8] Disparate treatment claims may be established by: (1) direct or indirect evidence, a.k.a. "mixed motive"; or (2) under the prima facie test articulated in *McDonnell Douglas* [*Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)], a.k.a. "pretextual." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359-360; 597 NW2d 250 (1999).

[9] The *Neal* Court noted that in *Jackson v Motel 6 Multipurpose, Inc*, 130 F3d 999 (CA 11, 1997), the Eleventh Circuit Court of Appeals vacated certification of a class action for racial discrimination by a hotel chain brought by its employees and customers because case-specific inquiries were required to delve into the facts of each incident of discrimination. The Court determined with respect to the customers that "[s]uch individual questions were much more predominant than whether the motel chain had a policy or practice of racial discrimination," and with regard to the employees that the case "involved very diverse individual claims and the only common issue among the employees was whether the motel chain had a practice or policy involving racial discrimination in providing accommodations." *Neal, supra* at 19-20.

he cut with a machete.[10] Further, plaintiffs Rodgers and Harrison had last chance agreements governing their return to work, and thus individual contractual issues specific to a plaintiff will be involved for some class members. See *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 505-506; 459 NW2d 1 (1989). Additionally, individualized questions exist concerning damages and mitigation, especially where one of the proposed class representatives and other potential class members are still employed at Ameritech. Given these circumstances, this Court is convinced that the case will devolve into a series of mini-trials. Courts should seek to avoid certifying a class that will "most likely splinter into an unmanageable plethora of individualized claims." See *Reyes v Walt Disney World Co*, 176 FRD 654, 658 (MD Florida, 1998).[11]

On the basis of the record before us, it is evident that highly individualized questions, rather than common issues of fact or law, predominate in determining if and how the individual plaintiffs may have been discriminated against on the basis of their race due to the implementation and use of Co-Ed. It is further evident that the proposed class representatives are not typical with respect to the class that they purport to represent. Thus, we reverse the trial court's grant of class certification with respect to the African-American potential class members. *A&M Supply Co, supra*.

With respect to the class certification of both the handicapped and the protesting potential class members, the trial court's opinion does not focus on either of these proffered categories and does not refer to testimony or facts regarding these categories. Under these circumstances, we find no basis on which to address this issue to any extent other than to vacate the trial court's certification of class with respect to the inclusion of these categories in the class.

---

[10] See *Duncan v Tennessee*, 84 FRD 21, 31 (MD Tenn, 1979) ("If a plaintiff's employment history, characteristics, qualifications, or activities are obviously anomalous, he cannot represent a class."). We acknowledge that the machete incident occurred before the Co-Ed program was implemented; however, an employee's work history is relevant in employment discrimination suits.

[11] In *Reyes, supra*, where the plaintiffs relied on a disparate treatment theory, the Eleventh Circuit explained:

> The Eleventh Circuit has previously written that the prosecution of disparate treatment claims "weighs against finding the commonality and typicality required by Rule 23." Such claims, by their nature, are highly individualized and are, therefore, not generally "conducive to class treatment." To maintain a class action in such a case, the representative plaintiffs must make a specific presentation of facts tending to demonstrate that proof sufficient to succeed on their claims will inevitably "bridge the gap" between their claims and those of the putative class. *Falcon*, [*supra*] at 157-58. In short, the representative plaintiffs must establish a factual and legal nexus between their claims and those of the proposed class. As the proposed class in the instant case is presently defined, the representative plaintiffs share only one thing with all putative class members: their [H]ispanic heritage. [*Reyes, supra* at 658; some citations omitted.]

Reversed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Henry William Saad